

if the plaintiff could resume his work as a carpenter six months after the accident, he would not be able to function as he could before the accident. He had worked for various employers after the accident, initially earning between \$10 to \$15 per day.

Now he is earning \$30 per day. I would estimate his loss of income up to date of trial to average \$200 per month, and for 68 months would come to \$13,600. Pre-trial loss of income and pre-trial partial loss of income would total \$17,200.

I find there is no loss or any reduction in his future earnings.

To summarise, the damages to be awarded to the plaintiff based on 100% liability on the defendant would be:

1) Special damages:

- | | |
|--|-------------|
| i) item (a) to (d) as agreed by the parties | \$ 200.00 |
| ii) Pre-trial loss and partial loss of income | \$17,200.00 |
| 3% interest p.a. from date of accident to date of trial. | |

- | | |
|--|-------------|
| 2) General damages for pain and suffering and loss of amenities | \$43,100.00 |
| 6 % interest p.a. from date of service of writ to date of trial. | |

Order accordingly.

Solicitors: *R.K. Nathan & Co.; V.P. Nathan & Partners.*

SENG HUP GUAN CO. v. SRI TINUSA SDN. BHD.

[O.C.J. (Wan Mohamed J.) January 28 & May 9, 1985]
[Sandakan – Civil Suit No. S131 of 1983]

– *Arbitration – Application for stay of proceedings – Whether should be allowed – Agreement for arbitration – Arbitration Act, 1952, s.6 – R.H.C. 1980, O.69, r.3(1).*

Practice and Procedure – Application for stay of proceedings – Whether should be allowed.

A The defendants applied for an order that all further proceedings in and relating to the claim filed by the plaintiffs in this action be stayed, pursuant to the agreement the Arbitration Act, 1952, and pursuant to the agreement between the plaintiffs and the defendants that a dispute between the parties be referred to an arbitrator.

Clause 16 of the said agreement reads: "Any difference, dispute or question which may arise at any time hereafter shall be referred to arbitration in accordance with the law for the time being in force."

The main issue was whether all further proceedings should be stayed.

Held: (1) the parties had clearly agreed that the subject matters be brought and decided by arbitration;

C (2) the defendants' application would be allowed in terms as stated in the order.

[*Editorial Note:* The plaintiffs have appealed to the Federal Court against the High Court decision on June 2, 1984.]

D

SUMMONS-IN-CHAMBERS.

Anthony Roderic Fernandez for the applicants/defendants.

Alex Khoo for the respondents/plaintiffs.

E

Cur. Adv. Vult.

Wan Mohamed J.: The defendants in this case by way of Summons-in-Chambers apply to the Court for an order that all further proceedings in and relating to the claim filed in by the plaintiffs in this action be stayed, pursuant to section 6 of the Arbitration Act, 1952, Laws of Malaysia, and pursuant to the agreement between the plaintiffs and the defendants that a dispute between the parties be referred to an arbitrator.

G The plaintiffs in their Statement of Claim claimed against the defendants for a liquidated sum of money being the balance of timber extraction fees in two separate sums and a further liquidated sum for road construction cost and for damages. There was a contract between the parties that plaintiffs were to extract timbers for the defendants and certain fees would be paid by the defendants to the plaintiffs. The plaintiffs filed the Writ of Summons on August 30, 1983. The defendants duly entered appearance but instead of proceeding with the filing of Statement of Defence, made an interlocutory application under Order 69, rule 3(1) of the Rules of the High Court.

The defendants in the affidavit sworn by their solicitor refers to Clause 16 of the agreement dated December 18, 1982, entered into by the parties as in exhibit marked "A". Clause 16 reads:

"Any difference, dispute or question which may arise at any time hereafter shall be referred to arbitration in accordance with the law for the time being in force."

The defendants' counsel in the same affidavit stated the following facts:

- (i) That the matters stated in the claim by the plaintiffs arose out of the said agreement and the defendants dispute them. The matters in dispute should be referred to and decided by arbitration.
- (ii) By some correspondence between the solicitors for the defendants and solicitors for the plaintiffs both parties had agreed that the matters be referred to an arbitrator but they had not come to an agreement to appoint a particular person to be the arbitrator; the one suggested by the defendants was disagreed by the plaintiffs.

The plaintiffs' counsel in his affidavit-in-reply affirmed and stated to the following effect:

- (i) That the Writ of Summons was filed on August 25, 1983, and subsequently issued by the High Court Registry on August 28, 1983.
- (ii) That the defendants entered appearance but no defence was filed.
- (iii) That the plaintiffs on October 28, 1983 sent for filing the "Judgment in Default of Defence" to the High Court Registry for sealing and return but it was never sealed nor returned.
- (iv) That the amount claimed was part of sum admitted by the defendants; and that the defendants had paid \$50,000 leaving a balance of \$171,568.75 as shown in exhibit marked "AK-1".
- (v) That the sum of \$171,568.75 is not disputed within the meaning of the agreement between the Plaintiffs and the defendants; and in his letter to the defendants' solicitors (marked exhibit "AK-3"), he insisted and maintained that the sum was not a matter of dispute.
- (vi) That the judgment in default of defence should be sealed and returned to the plaintiffs and no stay or setting aside thereof be allowed.

From the above I find that the issues disputed are as follows:

- (i) Whether the subject matters of the claim are disputed by the defendants; and whether they are matters within the scope of Clause 16 of the agreement.
- (ii) Whether the plaintiffs in the circumstances of this case are entitled to enter judgment in default of defence and that no stay of proceedings or setting aside thereof be allowed.

In considering the above issues I examined the Statement of Claim, the affidavits sworn by both parties together with the exhibits attached thereto, and the written submissions tendered by counsel on both sides. I find the case as follows:

A (1) The defendants had disputed the subject matters of the claim even before the plaintiffs filed in the Writ of Summons. The Writ of Summons was filed on August 30, 1983, whereas the defendants sent the letter as in exhibit marked "B" attached to the affidavit sworn by the counsel for the defendants to the plaintiffs on August 13, 1983, alleging and complaining the breach of the agreement. This was followed by another letter dated August 18, 1983, as in exhibit marked "C" sent by the solicitors for the defendants to the solicitors for the plaintiffs. The solicitors for the plaintiffs in their reply dated August 22, 1983, as in Exhibit marked "D" had proposed to appoint Datuk Khoo Than Choon as the arbitrator. The defendants through their solicitors made a counter proposal that an advocate and solicitor by the name of Mr. Chan Wing Kong be appointed as the arbitrator — refer to exhibit marked "F" dated September 5, 1983. From the documents attached and produced together with the affidavits of both sides, I find that although no particular person had been appointed as an arbitrator, the parties had clearly agreed that the subject matters of the claim be brought and decided by arbitration.

E (2) The fact that the Statement as in exhibit marked "AK-1" attached to the affidavit-in-reply by the counsel for the plaintiffs was acknowledged receipt by the defendants and that the defendants had partly paid from the total amount written in the Statement does not in the circumstances of this case infer that the whole amount in that Statement was not disputed. In this case the defendants disputed the subject matter of the claim, *i.e.* the claim for \$171,568.75 against them. Furthermore, as stated earlier, the defendants disputed the matter even before the plaintiffs filed this civil suit against them.

H (3) The Deputy Registrar or the Senior Assistant Registrar did not sign and seal or return the "judgment in default of defence" put in by the plaintiffs on October 28, 1983, because the defendants had earlier, *i.e.* on October 10, 1983, filed in this application to stay proceedings and to have the matter referred to an arbitrator.

I (4) The letter written by the solicitors for plaintiffs to the solicitors for the defendants dated November 18, 1983 among others reads:

"We have right from the beginning insisted and maintained that the sum of \$171,568.75 is not a matter of dispute. This was a liquidated claim for timber logs extracted and

delivered to your client. Your clients have exported the timber themselves and the contract fee should have been paid long time ago. Hence, we have proceeded to obtain the judgment."

I find the assertion by the solicitors for the plaintiffs as in the first sentence underlined above cannot hold water because in all earlier correspondence plaintiffs had never given such an indication, on the contrary, as stated earlier, the plaintiffs had agreed that the matter be referred to an arbitrator.

In the above premises I find the case for the defendants (applicants) and their application is therefore allowed in the terms as stated in the order.

Order accordingly.

Solicitors: *Shelley Yap Leong, Tseu Chong Chia & Co.; Peter Lo & Co.*

SIM HIANG KIAW & ORS v. LEE HOI KIM CONSTRUCTION CO.

[O.C.J. (Tan Chiaw Thong J.) May 27, 1985]
[Kuching – Suit No. KG. 95 of 1984]

Arbitration – Defendants attended summons for directions without objection – Whether a step in proceedings – Application for stay of proceedings – Whether should be granted – Arbitration Act, 1952, s. 6.

The defendants applied for an order that all further proceedings in this action be stayed pursuant to section 6 of the Arbitration Act, 1952 on the ground that the parties had by an agreement in writing of October 12, 1979 agreed to refer to arbitration the matters in respect of which this section was brought. The sole issue for decision was whether the defendants, before applying to court for stay of proceedings and having the matters referred to arbitration, had taken "any other steps in the proceedings". The defendants had appeared and attended the hearing of the summons for directions without any objection or qualification.

Held, the defendants had already taken a step in the proceedings within the meaning of s.6 of the Arbitration Act, 1952. The application must be dismissed with costs.

Case referred to:

- (1) *The County Theatres and Hotels Ltd. v. Knowles* [1902] 1 K.B. 480.

APPLICATION.

Loa Djin Liang for the plaintiffs.
Sulong Matjeraie for the defendants.

Cur. Adv. Vult.

A Tan Chiaw Thong J.: This is an application by the defendants for an order that all further proceedings in this action be stayed pursuant to section 6 of the Arbitration Act, 1952 on the ground that the parties have by an agreement in writing dated October 12, 1979 agreed to refer to arbitration the matters in respect of which this action is brought.

C The application is supported by an affidavit affirmed by learned counsel for the defendants. There is an affidavit in opposition sworn by Mr. Joseph Lim Joon Hin, a member of the firm of advocates acting for the plaintiffs.

D In my view, the matters at issue in this action would appear to be matters in respect of which, by virtue of the agreement mentioned earlier, the parties have agreed to refer to arbitration. The sole point to consider here, in my view, is whether in terms of section 6 of the Arbitration Act, 1952, the defendants before applying to this court to stay the proceedings and have the matters referred to arbitration, had taken "any other steps in the proceedings". The wording of this section is *in pari materia* with the corresponding English legislation except for the words "before a party has delivered any pleadings" which appear in the English legislation but not in ours. Be that as it may, as mentioned, the point to consider is whether the defendants before making their application for stay had taken any other steps in the proceedings.

G Arguments have been addressed to the court in relation to the filing of the Defence and Counterclaim and the application to the advocates for the plaintiffs for extension of time within which to do that, but in my view, irrespective of whether such actions taken by the defendants in this connection constitute a step taken in the proceedings, the crucial matter is whether by appearing and attending the hearing of the Summons for Directions without any objection or qualification, this constitutes a step taken by the defendants in the proceedings. In *Russell on Arbitration* (20th Edn.) page 172, para. 6, it is there stated that "The court has no discretion to stay, if the defendant allows the action to continue". In this connection, I am of the view that whether appearing at and attending the hearing of the Summons for Directions constitutes a step in the proceedings is governed by authority. I would in this connection refer to the case of *The County Theatres and Hotels, Limited v. Knowles*,⁽¹⁾ the headnote of which reads: